FOWLER v. HECKER.

Case No. 5,001.
{4 Blatchf. 425.}[1]

Circuit Court, S. D. New York. April 12, 1860.

EVIDENCE—FOLLOWING STATE STATUTES—ATTACHMENT OF WITNESS FOR CONTEMPT.

1. The state statutes which prescribe rules of evidence in civil cases, in trials at common law, are, by the 34th section of the judiciary act of 1789 (1 Stat. 92), made rules of decision in trials at common law, in civil cases, in the courts of the United States.

2. The provision extends so far as to make evidence competent which would be inadmissible under the rules of the common law, whether the state statute be or be not enacted subsequently to the passage of the judiciary act

3. Accordingly, a defendant made liable by the statute law of New York, to examination as a witness for the plaintiff, is liable to be attached for contempt in not obeying a subpoena issued by this court and served on him, commanding him to attend and be examined on the trial of a civil suit at common law, pending in this court

This was an action at common law, on trial before a referee appointed between the parties. A subpoena, issued under the seal of the court, on behalf of the plaintiff {John Fowler}, directed to the defendant {John Hecker}, commanding him to appear before the referee, as a witness for the plaintiff, at a time therein designated, and also requiring him to produce in evidence certain books of account, was duly served on the defendant, by the marshal, who made a return to that effect. The defendant refused to obey the subpoena. The plaintiff now, on affidavit and notice, moved for an attachment against the defendant, for contempt of court, in not obeying the subpoena. The defendant opposed the motion, on the ground that he was the party defendant to the record in the cause, and, as such, not liable by the statute laws of the United States, or the usages and practice of its courts, or the principles of the common law, to be called as a witness in the cause.

Horace Andrews, for plaintiff.

Robert B. Campbell, for defendant

BETTS, District Judge. In McNiel v. Holbrook, 12 Pet. {37 U. S.} 84, 89, the supreme court determined that the 34th section of the

judiciary act of 1789 (1 Stat. 92), embraces within its provisions those statutes of the several states which prescribe rules of evidence in civil cases, in trials at common law. The same principle is confirmed in Sims v. Hundley, 6 How. [47 U. S.] 1, 6. This doctrine is now followed in this circuit, in common law cases, in all instances where the statutes of the state render evidence competent which would be inadmissible under the rules of the common law, whether the state statute be or be not enacted subsequently to the passage of the judiciary act. The 390th section of the Code of Procedure of the State of New York provides, that "a party to an action may be examined as a witness, at the instance of an adverse party, or of any one of several adverse parties, and, for that purpose, may be compelled in the same manner, and subject to the same rules of examination, as any other witness, to testify either at the trial, or conditionally, or upon commission." Supposing the reference in the present case to have been legally instituted, the defendant was bound to obey the subpoena, and the cause he offers in excuse is no protection to him against the mandate. An order against the defendant for contempt of court may, accordingly, be entered and enforced against him, unless, at the adjourned day appointed for the hearing before the referee, he appears and submits himself to examination as a witness.

[NOTE. On the report of the referee to whom the cause had been referred by consent of the parties, judgment was rendered for the defendant, whereupon he brought error, and the cause was heard by the supreme court on motion of defendant in error to dismiss, which motion was overruled. Hecker v. Fowler, 1 Black (66 U. S.) 95. At the December term, 1864, the cause was again heard by the supreme court, and the judgment of the circuit court duly affirmed, Mr. Justice Clifford delivering the opinion; but the questions determined in the principal case did not arise, as the case was presented to the supreme court. Id., 2 Wall. [69 U. S. 123.]

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]